e-ISSN : 26203502
p-ISSN : 26153785

Settlement of International Disputes under the Law on Arbitration

C. Kastriote Vlahna
PhD, Doctoral student at the University "Hasan Prishtina" Pristina, Kosovo, Department of Civil Law
kastriote.vlahna@uni-prizren.com

Dr. Hajredin Kuçi
Prof, Regular professor in the field of law of Private Law, Faculty of Law, University of Pristina 'Hasan Prishtina', Pristina, Republic of Kosovo
hajredin.kuci@uni-pr.edu

Abstract: The private dispute resolution mechanism called arbitration enjoys recognition in all legal orders of contemporary states and is affirmed worldwide. Given the actuality and popularity of this alternative way of resolving disputes, it is not at all surprising the intensive study of dispute resolution before international commercial arbitration by contemporary legal theory. As a dominant instrument for resolving disputes from international trade and as a legal institute in which contractual and jurisdictional (judicial) elements are intertwined, international commercial arbitration can be studied in several directions: through the prism of international conventions, through the prism of national legislation, through the prism of the rules of arbitration institutions and through the prism of the practice of resolving various disputes. Dispute resolution through arbitration based on the prior agreement of the wills of the parties has been known for a long time and has a long tradition.

Keywords: Settlement of agreements, arbitration, arbitration decision.

Introduction

Arbitration as a specific way of resolving disputes has survived a long time and that as a result of the parties' confidence in it in resolving their disputes. The normative regulation of dispute resolution before international commercial arbitration in its current form is of the new age. So, although the roots of this private (non-state) institution of dispute resolution are found from the early days of our civilization, international commercial arbitration experienced its affirmation and expansion in the twentieth century. In particular, the period spanning the second half of the twentieth century is characterized by a greater commitment to international commercial arbitration.

The normative regulation of dispute resolution through arbitration has intensified, which has resulted in the issuance of a large and important number of normative acts both nationally and internationally. Mention should be made here of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the European Convention on International Arbitration of Commerce of 1961, the Washington Convention on the Settlement of Investment Disputes between States and Citizens of Other States of the Year 1965, as well as the international document Model Law on International Commercial Arbitration of UNCITRAL of 1985 (amended in 2006). There are also numerous legal sources in Macedonia, domestic and international, dealing with arbitration. Our state, in addition to being part of the most important multilateral conventions of arbitration, is part of the group of states that has adopted a special law on international commercial arbitration, a law which is the main national source governing this matter. It should be noted that the modernization of national domestic legislation in most states and the success of international conventions, especially the New York Convention, are one

e-ISSN : 26203502
p-ISSN : 26153785

of the key factors in the progress of international commercial arbitration, will be highlighted throughout the paper.

Entry

The rapid dynamism of social and economic change nowadays is characterized by the increase in the number of disputes. As with the good knowledge of dispute resolution before the courts more and more importance is being given to alternative methods in resolving disputes such as: judicial conciliation, mediation and arbitration. There are many reasons why the plaintiff initiates the contentious procedure. Thus, regardless of the purpose of conducting a contentious procedure, the purpose of the parties is oriented towards the rapid adoption of a court decision which will eliminate any unpredictability in the contentious law between the parties. On the other hand, the state expects legal decisions from the court and these two are often difficult to reconcile. The parties proceed from the fact that the court decisions are made immediately final while the state wants to provide the possibility of additional review of the regularity of the judgment. So due to legal certainty and any dispute must come to an end and in this is the purpose of the institution of the validity of the court decision.

Arbitration as a binding private-non-public decision-making alternative very useful in a large number of disputes mainly civil disputes. In this procedure the decision for resolving disputes is taken by the neutral third party (arbitrator or arbitration). In this respect it is seen that we are dealing with a trial that in general terms we can say that: arbitration is one of the fastest and most efficient alternative ways of resolving disputes that today the trends of modern society require. In this way businesses are interested in quick and non-bureaucratic dispute resolution. Arbitration is a procedure which nowadays globally dominates in disputes between businesses. The most complicated and costly disputes are resolved by arbitral tribunals around the world. The arbitration procedure is transparent and provides the means of control of the procedure by the parties. The procedure is provided by the rules of arbitration, but the duration, administration of evidence and some other elements of the procedure are decided by the consent of both parties to the dispute. The parties have the right to propose by an arbitrator who they feel has the professional and ethical capacity to serve as impartial and independent of any future circumstances. The other party has the right to challenge the appointment of the arbitrator proposed by the other party if he proves that he can not be independent, in this case the two arbitrators proposed by the parties appoint the third arbitrator. This balance makes it impossible for one party to be harmed by the decision of the arbitral tribunal, which is one of the main reasons why arbitration is advancing day by day in resolving private-civil disputes between individuals. Taking into account the arbitration agreement, the parties from the very beginning of the conclusion of the main contract should make it known that in case of dispute regarding the object of the main contract, a second contract should be concluded which contains the arbitration agreement, which in this case disputed in case it happens to be resolved through the arbitral tribunal. However, during the entire procedure, the parties to the agreement must take into account whether that agreement is valid, because if the agreement is considered invalid, then the arbitral award will also be invalid. Regarding the invalidity of the agreement and the cases when an agreement can be considered invalid exactly will be treated in this paper.

I. Importance and development of the Arbitration procedure

Arbitration is an alternative dispute resolution mechanism, widely used in developed countries, and is also available in Kosovo. Important reasons why businesses often select arbitration before appearing in regular state courts are the speed, efficiency, autonomy of the party, and the final nature of the arbitral awards. For this, the International Chambers of Commerce are the initiators of international economic arbitration and therefore the OEN procedures are often used today for international arbitration. The arbitration procedure can be conducted in this way because it is considered beneficial to the purpose, provided that the parties are treated equally and given the opportunity to hear them. The arbitration procedure starts on the date when the request is

e-ISSN : 26203502
p-ISSN : 26153785

accepted by the defense party (the defendant) unless the parties agree otherwise.[1] Thus, the arbitration procedure regarding a certain dispute starts on the day when the request for the dispute to be submitted to arbitration for settlement is accepted by the respondent party.[2] Arbitration can generally be defined as a means of resolving a dispute between two parties by means of a decision given by a third party to natural or legal persons[3] (states) on the basis of which disputes arising between states try to settle them through international arbitration.[4] Arbitration is first of all created based on the agreement of the parties, because without the consent of both parties this in reality can not be realized.[5] At each stage of the proceedings, the arbitral tribunal may hold a hearing with witnesses to hear the experts and to enable the parties to state their views on the evidence. The arbitration procedure is significantly different from the court procedure among others in contrast to its relation to the rules of procedure. For court proceedings most of the rules are of an imperative nature (ius cogens) so the procedural law does not authorize the parties to agree on the rules according to which the court will act (the principle of constitutionality and legality).[6]

If an oral arbitration hearing is held, it is obliged to invite the parties to participate in the hearing in time. Arbitration requires from the parties all the evidence which corroborates the statements in the lawsuit or counterclaim.[7] For the resolution of a certain dispute, the arbitral tribunal will determine with the greatest care which evidence it will elaborate in the procedure. It is more important to respect the principle of equality of the parties in the arbitration procedure when elaborating the evidence where they should have an equal position. In order to obtain the necessary evidence, the arbitral tribunal may seek the assistance of the state courts in securing various decisions and in the elaboration of evidence by the state court when it is not possible for the arbitral tribunal to elaborate.[8]

Given that arbitration is an institution with a very long tradition and a great affirmation, which is growing, it is quite understandable that arbitration in legal theory can be clarified and defined in different ways. Thus, we can say that there are numerous attempts to define arbitration.[9] The term "arbitration" can have at least two meanings, and on the one hand by this term we mean the manner, method or technique of resolving disputes, and on the other hand by it we mean the body or institution that resolves the dispute, respectively brings decision on the contentious issue.[10] International commercial arbitration can be defined as "a private method of resolving disputes, chosen by the parties themselves as an effective way to end disputes between them, without resorting to the courts of law.[11]

In addition to these abstract definitions which define arbitration as a way, method or technique for resolving disputes, in legal theory there are also many other abstract definitions which define

[1] Morina. Iset, "arbitration and Arbitration Procedure", Prishtina, 2015, p, 183;
[2] See: Law no. 02 / L-75. Kosovo Arbitration Law, Prishtina 2008, Article 18;
[3] Puto. Arben. "Public International Law". Tirana, 2010, p, 442;
[4] International arbitration means the settlement of disputes between states by a decision given by one or more arbitrators, or by a body chosen by the parties;
[5] Hetemi. J. Mejdi.International Commercial Law, Prishtina, 2007, p, 471;
[6] Musa, Mustafa, "Arbitration Law", Gjilan, 2012, p, 80;
[7] Article 26, of the Arbitration Rules of the UNCTRAL Model Law;
[8] Musa, Mustafa, "The Right of Arbitration", Gjilan, 2012, p, 84;
[9] The most important acts related to commercial arbitration law are: the Geneva Protocol to the Arbitration Clauses of 1923, the Geneva Convention on the Enforcement of Foreign Arbitral Awards of 1927, the New York Convention on the Recognition of and execution of foreign arbitral awards of 1958, the European Convention on International Arbitration of Commerce of 1961, the Washington Convention on the Settlement of Investment Disputes between States and Citizens of Other States of 1965, and the international model Model Law on Arbitration UNCITRAL international trader of 1985;
[10] The European Convention on International Commercial Arbitration of 1961 in Article 1, paragraph 2, sub-b, provides these two meanings, where it is emphasized that the term "arbitration" means not only the settlement of disputes before arbitrators appointed for certain cases (ad hoc arbitration), but also before institutional arbitrations.
[11] A. Redfern, M. Hunter, law and practice of international commercial arbitration, fourth edition, London, 2004, p, 1.

e-ISSN : 26203502
p-ISSN : 26153785

arbitration as a body or institution that resolves disputes. The same definition regarding the notion of arbitration is made by the current law in Albanian-speaking countries as follows: Arbitration is one of the most common and modern methods for resolving disputes which arise during operational developments in international trade. This is a private dispute resolution tool based on the prior agreement of the parties to refer the eventual dispute to a private court. Proceedings before the arbitral tribunal tend to be much faster than the same contentious issue being referred to a national court to be adjudicated or adjudicated. Regular courts usually have limited time, long and varied lists of cases which require a deeper focus and attention to try a case which is a difficult situation. Although arbitral tribunals must meet the requirements of natural justice and decide in accordance with the law they must and can approve proceedings with flexibility and speed. Arbitration may be more expensive than litigation in a regular court, but traders like this procedure and agree in principle to stay in this procedure precisely to gain in time and procedural simplicity. In addition arbitrage costs usually have to be affordable by the parties and are not taxed by taxpayers under the regulation.

I. 1. Arbitration agreement

The final arbitration contract between the parties to the dispute is the basis of the arbitration procedure and the authorization of the arbitral body. By concluding the arbitration contract, the parties entrust the arbitral body with issuing the decision regarding the disputes, which are included in the arbitration contract. The powers of the arbitral tribunal are limited by the arbitration contract. With an arbitration contract, the parties can determine the essential elements of the arbitration procedure themselves, so they can also determine the material and procedural elements.[12]

The necessary condition for entering into the arbitration procedure is the arbitration clause. This stipulates that the parties in a legal case are not subject to due process, but to arbitration. In the event of an existing dispute, the parties may agree to adjudicate their dispute through arbitration. Normally, arbitration clauses are part of the content of the contract. The arbitration clause contains information if all or only legal disputes set forth in it are adjudicated within the arbitration. It also contains information about the composition of the arbitral tribunal, or the rules under which it will be adjudicated, and where the seat of the arbitral tribunal should be. In international business relations it is very logical to also determine in which language the arbitration procedure will take place. The arbitration clause must also contain the law applicable to this procedure. The model arbitration clause, based on the UNCITRAL Rules of Arbitration of 2012[13] has the following content.

Any dispute, dispute or claim arising out of or relating to this contract, or its breach, termination or invalidity, shall be settled by arbitration in accordance with the rules of UNCITRAL, where by these rules the parties must take into account:

(a) The appointing authority is ... [name of institution or person];

(b) The number of arbitrators is ... [one or three];

(c) The place of arbitration shall be ... [city and place];

(d) The language to be used in the arbitration proceedings shall be.[14]

The validity of an arbitration clause depends on whether it is valid under national law. Applicable national law must be determined on the basis of the rules of private international law. The validity of an arbitration clause also depends on whether the contract is valid or whether it

[12] Hetemi. J. Mehdi, International Commercial-Commercial Law, Prishtina, 2007, p, 427.
[13]See:http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. (6.1.2016). I get on dt. 01.04.2015, time: 17:12.
[14] All disputes arising out of or in connection with this contract shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.

e-ISSN : 26203502
p-ISSN : 26153785

was agreed in writing. In the event that one of the parties appeals against the validity of an arbitration clause, then as a rule, the arbitrators are the ones who decide on the validity and jurisdiction (so-called Jurisdiction).[15] At the same time, the parties who have agreed on the implementation of the arbitration clause should be allowed to participate in the arbitration process. Also, if the parties have agreed to adjudicate their disputes within arbitration, then the courts have no jurisdiction over such legal disputes. This lack of jurisdiction of the courts must be validated by one of the parties involved at the beginning of the trial.[16]

I. 2. Issuance of the arbitral award

"Arbitral award" is the final decision of the arbitral tribunal in the case in question and is equivalent to a decision issued by a court. In principle and usually the process before the tribunal ends with a final decision, in which case the issue, which is the subject of the dispute, is decided in a meritorious manner. This completes the process before the arbitral tribunal.[17] The rules for decision making are quite detailed in all arbitration laws and institutions. The Kosovo Law on Arbitration first clarifies which law the arbitral tribunal must apply when making a decision. In this regard, the Law provides that the arbitral tribunal may refer to these three laws, which are:

1. The law determined by the parties as applicable to the subject matter of the dispute
2. If not determined by the parties, then the law determined on the basis of the rules of private international law, and
3. In all other cases, the legislation of Kosovo.[18]

The first two cases are clear, ie when the law is defined in the contract by the parties and when no law is defined. In the first case, the law chosen by the parties itself applies, while in the second case, the tribunal must refer to the rules of private international law. The solution offered in point three is very vague, because it does not clarify what are the "other cases" to which Kosovo legislation applies.

Even in the proceedings before the arbitral tribunal - as in the proceedings before the state court - different types of decisions may be rendered, depending on the criteria taken as the basis for their classification.[19] Depending on the relationship between the object of the trial and the slide of the arbitral award (respectively depending on their procedural function), the arbitral awards may be final, partial, intermediate and complementary.[20] A special type of arbitration award is also one that is made on the basis of bargaining.[21]

Conclusion

The arbitration procedure is conducted on the basis of the elements which the parties have determined on the basis of their agreement. In addition to the agreement as a general clause, the parties should always be based on the law on arbitration, which in the positive law of Kosovo, is well defined dispute resolution through arbitration procedure and that through the law on arbitration. Most international as well as domestic cases claim to be resolved through arbitration, arguing that it is a faster, more economical and more favorable procedure for the parties. Based on the practice and the requests of the parties for their disputes to be resolved through the arbitration procedure, then we have decided to present some of the essential issues in the content of this paper. Thus, in general, the content of the paper talks about the importance of the

[15] See Article 5 of the European Convention; Article 21 I UNCITRAL Rules of Arbitration. Within the ICC arbitration procedure, the International Court of Arbitration has an important role (see Article 8.3 of the ICC 2012 Arbitration Rule).
[16] See:http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. (6.1.2016). I get on dt. 01.04.2015, time: 17:16
[17] Morina. Iset. Arbitration and Arbitration Procedure. Prishtina 2015, p, 208;
[18] See: Law no. 02 / L-75. Kosovo Arbitration Law, Prishtina, 2008; Article, 29;
[19] Morina. Iset. Arbitration and Arbitration Procedure. Prishtina 2015, p, 213;
[20] R. Turner, Arbitration awards: a practical approach, Blackwell Publishing Ltd, Oxford, 2005, p, 3;
[21] Ibid, p, 17.

e-ISSN : 26203502
p-ISSN : 26153785

arbitration procedure, the development of the procedure, as well as the decision that the arbitrator can take in concluding an arbitration procedure.

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8. The European Convention on International Arbitration of 1961 in Article 1, paragraph 2, sub-b, provides these two meanings, where it is emphasized that the term "arbitration" means not only the settlement of disputes before arbitrators appointed for certain cases (arbitration ad hoc), but also before institutional arbitrations;
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